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IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 353M—ORIGINAL.

IN THE MATTER

of

The Petition of the GLORIA O TOWING CORPORATION for a writ of prohibition and/or a writ of mandamus, against the Honorable Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York, and all other Judges and officers of said Court, and for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE ABOVE-NAMED RESPONDENTS AND AMERICAN BRIDGE COMPANY, IN OPPOSITION TO THE PETITION.

I.

THE PRESENT STATUS OF THE LITIGATION, AND THE QUESTION INVOLVED, DO NOT SUPPORT THE EXTRAORDINARY PROCEDURE PRAYED FOR BY PETITIONER.

Petitioner is seeking to have this Court review and reverse a non-final order entered by the Honorable Mortimer W. Byers, Judge of the District Court of the United

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It is assumed that petitioner's failure to include American Bridge Company with the other respondents named in the motion papers was an oversight. American Bridge Company, as libelant in the District Court, is a party to the proceedings.

States for the Eastern District of New York, in a suit in admiralty, by American Bridge Company, libelant, against the tug *Gloria O* and Gloria O Towing Corporation, claimant-respondent. The said order over-ruled petitioner's motion to dismiss the libel on exceptions to the admiralty and maritime jurisdiction of the Court (R. 13, 15-17; 24).

The libel against the tug *Gloria O, in rem,* and her owner *in personam,* (R. 8-10) is for damage allegedly caused by the tug's negligence in colliding with certain pilings which were imbedded in the New York State Barge Canal and which supported structure used in the course of American Bridge Company's construction of a bridge across the Canal.

The jurisdiction of the District Court in admiralty over the subject matter of the suit rests upon the provisions of the Act of Congress of June 19th, 1948, Ch. 526, (Title 46, U. S. Code sec. 740), which extended the admiralty and maritime jurisdiction of the United States to include "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."*

Despite the confusion created by petitioner's frequent injection of references to trial by jury, and to the defense of contributory negligence under the law of New York State, the sole question involved in the District Court's order over-ruling petitioner's exceptions to the admiralty jurisdiction is whether Congress exceeded its constitutional powers in its aforesaid legislative enactment. If the Act is constitutional, and the admiralty jurisdiction exists, then petitioner's arguments of trial by jury, and contributory negligence, are irrelevant.

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* The text of the Act is printed in full in the Appendix to this brief.

The order which Judge Byers entered, upon his ruling that the aforesaid Act is constitutional (R. 18-24), was not a final order in the litigation, and, as the order sustained the Court's jurisdiction, there is no interference with appellate jurisdiction in regular course of procedure. It would seem, therefore, that, under the decisions of this Court, the situation does not call for the extraordinary procedure prayed for by the petitioner in its attempt to obtain a shortcut.

In *Roberts* v. *U. S. District Court*, 339 U. S. 844, at page 845, this Court said

> "Mandamus is an extraordinary remedy, available only in rare cases."

In *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, this Court said:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. * * * Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal." (At page 26.)
>
> "For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. * * * And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, * * * or denying a nonsuit * * * despite the inconvenience to petitioner of being

forced to proceed to trial in advance of a review of the court's action." (At pages 30-31.)

"In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court." (At page 32.)

In *Ex Parte Roe*, 234 U. S. 70, at page 73, this Court said:

"The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal."

To the same effect: *Ex Parte Harding*, 219 U. S. 363; *I. C. C.* v. *United States*, 289 U. S. 385; *United States* v. *Bondy*, 171 F (2d) 642; *United States* v. *Rabb*, 147 F (2d) 225.

Aside from the procedural limitations indicated by the foregoing authorities, the review which petitioner is seeking here is premature, by reason of the following circumstances.

(a) A trial of the suit in admiralty might result in a decision that the *Gloria O* was not guilty of negligent navigation, and that the libel should be dismissed.

(b) The proofs offered upon a trial in admiralty might develop that the pilings with which the *Gloria O* collided not only served to support libelant's bridge construction work, but also served as an aid to navigation, with lights

thereon, to guide and protect passing vessels; and that an Admiralty Court would thereby have jurisdiction, irrespective of the Act of Congress now in question. *Doullut* v. *United States,* 268 U. S. 33.

In either of the foregoing events, the question of the constitutionality of the Act of June 19th, 1948 (Title 46 U. S. Code sec. 740) would become moot.

II.

THERE IS NO EMERGENCY REQUIRING AN IMMEDIATE REVIEW BY THIS COURT FOR PROPER PROTECTION OF THE PETITIONER'S RIGHTS.

It is reasonably apparent that petitioner's attack upon the admiralty jurisdiction is prompted principally by the hope that, at Law, contributory negligence of American Bridge Company might be established as a complete defense under the applicable law of New York State. Even if there be any merit in the arguments on which petitioner seeks to obtain that result by ousting the admiralty jurisdiction, nevertheless, there is nothing detrimental to the petitioner's rights in requiring the petitioner to proceed with a trial in admiralty and seek a review of Judge Byers' ruling and order by normal appellate procedure, if that becomes necessary.

Admiralty does not shut its eyes to a defense of contributory negligence. Upon a trial of the case in admiralty, your petitioner can present all available proofs to support either complete exoneration of the tug *Gloria O* or contributory negligence of the libelant, and if contributory negligence is proven, it will reduce libelant's recovery to fifty per cent, under the applicable law of admiralty in collision cases of this type. *Atlee* v. *Packet Company,* 88

U. S. 389, at page 395; *Halcyon Lines* v. *Haenn et al.* ..... U. S. ....., October Term 1951, Nos. 62 and 197, decided January 14th, 1952; *In re Pennsylvania R. Co.*, 48 F (2d) 559, 565-566, cert. denied, 284 U. S. 640. If, thereafter, the Appellate Courts should rule that the Act of Congress involved herein is unconstitutional, and that the District Court was without jurisdiction in admiralty, they could view the entire proceeding as an action at Law, and thereby give immediate effect to the complete defense of contributory negligence, at Law, under any finding of the Admiralty Court that there was contributory negligence. *Prince Line Ltd.* v. *American Paper Exports*, 55 F(2d) 1053, 1057, *United States* v. *The John R. Williams*, 144 F(2d) 451; cert. denied, 323 U. S. 782.

There is no support for, or merit in, petitioner's present contention that it must either stand mute at a trial in admiralty, or forfeit its rights. (Petition, p. 8.) There is nothing to justify petitioner's contention that the petition presents "an issue fundamental to the further conduct of the case", or to make the present matter comparable to the cases cited in support of that contention. (Notice of Motion, p. 2.)

III.

The petition should be denied.

The immediate question is whether this Court should issue an order to show cause, or a writ of certiorari, as prayed for by the petitioner. For the reasons already stated, the respondents named in the petition, and American Bridge Company, believe that the petition should be denied.

It is assumed, however, that if the petition is granted with respect to either portion of its prayer, the respondents

named in the petition, and American Bridge Company, will be granted an opportunity to brief and argue the constitutionality of the Act of Congress which is involved, and which received Judge Byers' careful consideration (R. 18-24).

Without briefing that question at this time, the Court's attention is directed to the fact that the Act (Title 46, U. S. Code, sec. 740) was intentionally enacted by Congress to extend or enlarge the interpretation of the admiralty jurisdiction set forth in the earlier decisions of the Courts, which have been cited on pages 11 and 12 of petitioner's brief. The background of the enactment and the approval of it given by the Attorney General and the Secretary of the Navy are fully set forth in U. S. Code Congressional Service, 80th Congress, Second Session, 1948, Vol. 2, pages 1898-1904.

Respectfully submitted,

ROBERT S. ERSKINE,
Attorney for Respondents named in the Petition herein, and for American Bridge Company.

JOHN H. HANRAHAN, JR.,
Of Counsel.

APPENDIX.

Title 46, United States Code, Section 740, reads as follows:

> "Sec. 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.
>
> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> "In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496."